Federal Court  Cour fédérale

Date: 20190712

Docket: IMM-3817-18

Citation: 2019 FC 929

Ottawa, Ontario, July 12, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

CATHERINE TANTOG OCAMPO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a citizen of the Philippines who applied for permanent residence in Canada under the Spouse or Common-law Partner in Canada class. On July 27, 2018, her application was denied by an immigration officer at Immigration, Refugees and Citizenship Canada (the "Officer"). The Officer determined that the Applicant was not eligible for the Spouse or Common-law Partner in Canada class because her sponsor had previously applied for

permanent residency and, at the time the sponsor was granted permanent residency, the sponsor did not declare the Applicant as his common-law partner.

[2] I am setting this decision aside for the following reasons.

II. **Facts**

[3] The Applicant, Catherine Tantog Ocampo, is a citizen of the Philippines born on November 10, 1985. The Applicant is married to Wilford Matagay (the "Sponsor"), and the couple have one child together, Jayden.

[4] The Applicant came to Canada in July 2013 as a foreign worker, and began cohabiting with the Sponsor on or about July 20, 2013. The couple lived in a house with other roommates from July 2013 until February 2015.

[5] At the hearing of this matter, the parties agreed that the Sponsor filed an application for permanent residence in September 2013.

[6] In March 2015, the Applicant and the Sponsor began living together without roommates.

[7] On September 9, 2015, the Sponsor became a permanent resident of Canada.

[8] On March 6, 2016, by way of an immigration representative, the Applicant submitted an application for permanent residency under the Spouse or Common-law Partner in Canada class (the "First Application").

[9] The Applicant and the Sponsor were married on May 20, 2017.

[10] On June 2, 2017, the First Application was refused by an immigration officer at Immigration, Refugees and Citizenship Canada under subsection 125(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations"), on the basis that the Sponsor had not declared the Applicant as his common-law spouse during the processing of his own permanent residence application or during his landing interview (the "First Decision"). The substantive portion of the Officer's analysis is exerted below:

> Your sponsor failed to declare you and have you examined for the purposes of immigration, within his/her application for permanent residence. You met your common-law partners in person on 2013/07/20 and began cohabitating on 2013/07/20. On 2014/07/20 you became common-law after residing together for one year. At that time, your sponsor was in the process of obtaining Permanent Resident status. He became a Permanent Resident on 2015/09/09 and did not list you as a dependant. He failed to declare you as his common-law partner to immigration during the processing of his application and during his landing interview. As he failed to declare you as his common-law partner, Citizenship and Immigration was not given the opportunity to conduct an examination. As a result, I have determined that you are not a member of the spouse or common-law partner in Canada class.
>
> [Emphasis added]

[11] There is no evidence before the Court that the Applicant sought judicial review of the First Decision.

[12] On July 26, 2017, by way of the same immigration representative, the Applicant submitted a second application for permanent residency under the Spouse or Common-law Partner in Canada class (the "Second Application").

[13] In the IMM 5532 form included in the Second Application, the Sponsor and the Applicant described the nature of their relationship, including that:

> (i) they met in person for the first time on July 20, 2013 at the Calgary International Airport;
>
> (ii) prior to this meeting, they had been communicating over Skype and through online messaging for approximately four months;
>
> (iii) prior to this meeting, they had a "special feeling with each other" and had already decided to live together as soon as the Applicant arrived in Canada; and
>
> (iv) they have been cohabiting since July 20, 2013.

[14] The Second Application also included several letters from friends and relatives, indicating that the Applicant and the Sponsor have been in a relationship since 2013, and undated photographs of the couple together at various events.

III. **Decision Under Review**

[15] The Global Case Management System ("GCMS") notes indicate that the Officer reviewed the Second Application on June 7, 2018 and identified concerns that the Applicant was excluded from the Spouse or Common-law Partner in Canada class by virtue of subsection 125(1) of the Regulations:

> Sponsorship refused PREVIOUS SPONSORHIP REFUSED 2017/06/22 on FCC Application F000427235 for excluded

> relationship at CPC-M by Officer MP18835. SPR and PA submitted new FC1 application, lock in date: 2017/07/28. SPR landed 2015/09/09 as PV2 as Divorced. On IMM 5532 they state they have been cohabitating since 2013/07/20 (which is consistent with the FCC refused by Officer MP18835 (notes below)). SPR and PA Married on 2017/05/20 in CDA. Birth Cert received for CC born child born 2017/08/17. SPR still meets the definition of Excluded Relationship. I have considered the new documents provided (marriage certificate and birth of CC born child) and I am satisfied that this is an excluded relationship as per R 125 (1) (d). Sponsorship refused. Letter sent to SPR on this date via email to rep on file OPT to Continue PFL sent to PA via email to rep on file BF 30 days.

[16] On June 7, 2018, the Officer sent procedural fairness letters to both the Applicant and the Sponsor, indicating that the Officer had concerns that the Applicant was ineligible for the Spouse or Common-law Partner in Canada class due to the Sponsor's failure to declare the Applicant as a common-law partner at the time of his own permanent residence application and landing appointment. The Applicant and the Sponsor were each given 30 days to respond to the Officer's concerns. Neither the Applicant nor the Sponsor replied to the procedural fairness letters.

[17] In a letter dated July 27, 2018 and addressed to the Applicant, the Officer refused the Second Application (the "Second Decision"). The substantive portion of the Officer's analysis is exerted below:

> …Your sponsor failed to declare you as his common-law spouse and have you examined for the purposes of immigration, within his application for permanent residence. Instead, your sponsor declared himself as "divorced" <u>when he became a permanent resident of Canada in September 2015.</u> As a result, it has been determined that you are not a member of the spouse or common-law partner in Canada class.
>
> [Emphasis added.]

[18] The Applicant seeks judicial review of the Second Decision.

IV. **Issues**

[19] The issues are:

(i) Should certain contents of the Application Record be disregarded by the Court?

(ii) Is this application a collateral attack on the First Decision?

(iii) Did the Officer err by rejecting the Second Application?

V. **Relevant Provisions**

[20] "Common-law partner" is defined in subsection 1(1) of the Regulations:

common-law partner means, in relation to a person, an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year. (*conjoint de fait*)	conjoint de fait Personne qui vit avec la personne en cause dans une relation conjugale depuis au moins un an. (*common-law partner*)

[21] Section 124 of the Regulations outlines which foreign nationals are considered members of the Spouse or Common-law Partner in Canada class:

124 A foreign national is a member of the spouse or common-law partner in Canada class if they (a) are the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada;	124 Fait partie de la catégorie des époux ou conjoints de fait au Canada l'étranger qui remplit les conditions suivantes : a) il est l'époux ou le conjoint de fait d'un répondant et vit

(b) have temporary resident status in Canada; and	avec ce répondant au Canada;
(c) are the subject of a sponsorship application.	b) il détient le statut de résident temporaire au Canada;
	c) une demande de parrainage a été déposée à son égard.

[22] Section 125(1)(d) of the Regulations outlines that a foreign national shall be not be considered a member of the Spouse or Common-law Partner in Canada class if their sponsor previously made an application for permanent residence and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined:

125 (1) A foreign national shall not be considered a member of the spouse or common-law partner in Canada class by virtue of their relationship to the sponsor if	125 (1) Ne sont pas considérées comme appartenant à la catégorie des époux ou conjoints de fait au Canada du fait de leur relation avec le répondant les personnes suivantes :
…	…
(d) subject to subsection (2), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	d) sous réserve du paragraphe (2), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.
[Emphasis added]	

[23] Subsection 125(2) of the Regulations does not apply to this matter.

VI. **Standard of Review**

[24] Decisions of an immigration officer regarding applications for permanent residence under the Spouse and Common-law Partner in Canada class are subject to the standard of review of reasonableness (*Amandeep v Canada (Citizenship and Immigration),* 2018 FC 27 at para 14). Reasonableness review is concerned with the existence of justification, transparency and intelligibility within the decision-making process, as well as whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick,* 2008 SCC 9 at para 47).

VII. **Analysis**

A. *Should evidence relating to the First Application be disregarded?*

[25] In their Further Memorandum of Argument, the Respondent argues that the Court should disregard pages 17 to 26, 28 to 33, and 92 to 143 of the Applicant's Record, as they were not before the Officer at the time of the Decision.

[26] As a general rule, judicial review of an administrative action is conducted on the basis of the evidence that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Association of Universities*]). There are certain exceptions to this rule, which do not apply to this proceeding (*Association of Universities,* above at para 20).

[27] I will give no weight to pages 17 to 26 and 92 to 95 of the Applicant's Record. These pages consist of emails between the Applicant and her immigration representative. These emails were not before the Officer, and bear no relevance to this proceeding.

[28] I will also disregard pages 28 to 33 of the Applicant's Record. Pages 28-30 consist of a notice of reassessment for the 2016 tax year, issued by the Canada Revenue Agency ("CRA") to the Applicant in October 2017. This document is not contained in the Certified Tribunal Record (the "CTR"), does not appear to have been before the Officer, and bears no relevance to this proceeding.

[29] Pages 31 to 33 consist of a notice of reassessment for the 2016 tax year issued by the CRA to the Sponsor in October 2017. Contrary to the submissions of the Applicant at the hearing of this matter, this document does not appear in the CTR, and in any event it bears no relevance to this proceeding.

[30] I will allow pages 96 to 143 of the Applicant's Record. These pages consist of the Applicant's First Application and the documents included therein. These pages are not included in the CTR, but from a review of the GCMS notes it is clear that the Officer not only had access to these documents, but in fact reviewed them, at the time of rendering the Second Decision. Therefore, I am satisfied that these pages were before the Officer and are appropriately before this Court. I would also add that the Respondent relies on the contents of the First Application at several points in their submissions, and therefore should be precluded from challenging their admissibility.

B. *Is this application a collateral attack on the First Decision?*

[31] The Respondent argues that as the Applicant did not seek judicial review of the First Decision, this application for judicial review is a collateral attack on the First Decision.

[32] However, the text of the First Decision explicitly mentions the Applicant's right to reapply:

> Should you wish to reapply, you will be required to submit a new application and pay a new processing fee. Any new application will be assessed according to the *Immigration and Refugee Protection Act* in force at the time the new application is filed.

[33] Furthermore, this Court has repeatedly confirmed an applicant's right to reapply for permanent residence (see e.g. *Cardona v Canada (Citizenship and Immigration)*, 2017 FC 959, and the cases cited therein).

[34] Therefore, this application is not a collateral attack on the First Decision. However, pursuant to Rule 302 of the *Federal Courts Rules*, SOR/98-106, this application is limited to a judicial review of the Second Decision.

C. *Did the Officer err by rejecting the Second Application?*

[35] "Common-law partner" is defined in subsection 1(1) of the Regulations to mean, "in relation to a person, an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year." There are two terms contained within this definition which merit further explanation.

[36] First, the Regulations do not define "conjugal relationship". However, this Court has repeatedly adopted the test outlined by the Supreme Court of Canada in *M v H,* [1999] 2 SCR 3 at para 15:

> *Molodowich v. Penttinen* (1980), 1980 CanLII 1537 (ON SC), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal… In order to come within the definition, neither opposite−sex couples nor same−sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal".

[37] Second, the Regulations do not define "cohabiting". The Operating Procedures of the Respondent indicate that in considering whether a couple is cohabiting, a number of factors may be considered, including the existence of joint bank accounts, joint leases, and shared household chore responsibility. However, this analysis should be purposive and contextual, and other evidence may be considered.

[38] Both parties focused their submissions on whether the Officer was reasonable to reject the Second Application on the basis that the Sponsor did not declare the Applicant as his common-law partner at the time his permanent residency was granted in September 2015. These submissions focus on the wrong point in time, and do not aid the Court in resolving this matter.

[39] Section 125(1)(d) of the Regulations outlines that a foreign national shall not be considered a member of the Spouse or Common-law Partner in Canada class if their sponsor

previously made an application for permanent residence and, "at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined."

[40] The relevant time for assessing the nature of the relationship between the Applicant and the Sponsor is September 2013, when the Sponsor filed his application for permanent residence. This was clearly stated by Justice Kelen in *Cai v Canada (Citizenship and Immigration)*, 2007 FC 816 at paragraph 10 [*Cai*]:

> [10] The immigration officer denied the applicant's application for permanent residence under section 124 of the Regulations because the immigration officer determined that the applicant was a non-accompanying family member of his sponsor when she applied for permanent residence and was not examined at that time. This application turns on whether the applicant's sponsor was required under paragraph 125(1)(d) of the Regulations to declare the applicant as her common-law partner when she applied for permanent residence on January 27, 2005.
>
> [Emphasis added]

[41] Similar to the *Cai* decision, this application turns on whether the Sponsor was required to declare the Applicant as his common-law partner when the Sponsor applied for permanent residency in September 2013.

[42] The Officer reasonably concluded that (1) the Applicant and the Sponsor began cohabiting in July 2013, (2) the couple were in a conjugal relationship beginning in July 2013, and (3) therefore the couple became common-law partners within the meaning of the Regulations in July 2014. Contrary to the Applicant's arguments, the Officer was under no duty to reject clear statements by the Applicant that the couple began cohabiting in July 2013 and search out evidence which the Applicant had not placed before the Officer which might refute the

Applicant's clear statements. Furthermore, the Applicant does not dispute before this Court that the couple began cohabiting in July 2013, or attempt to argue that the couple were not in a conjugal relationship beginning in July 2013. Frankly, the Applicant's submissions on this point defy common sense.

[43] However, the Officer erred by using the conclusion that the couple became common-law partners in July 2014 to reject the Second Application. The Officer's analysis should have focused on the date the Sponsor applied for permanent residence in September 2013.

[44] In September 2013, the Sponsor was under no obligation to declare the Applicant as his common-law partner, as the couple did not become common-law partners until July 2014. As a result, the Applicant is not precluded from the Spouse or Common-law Partner in Canada class by paragraph 125(1)(d) of the Regulations.

[45] The Officer's erroneous interpretation of section 125(1)(d) of the Regulations led directly to an unreasonable rejection of the Second Application, and this matter must be returned for reconsideration by a different immigration officer in accordance with these reasons.

VIII. **Certified Question**

[46] Counsel for both parties was asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

IX. **Conclusion**

[47] This application for judicial review is allowed.

JUDGMENT in IMM-3817-18

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside and the matter referred back for redetermination by a different immigration officer.

2. No question is certified.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3817-18
STYLE OF CAUSE:	CATHERINE OCAMPO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	CALGARY, ALBERTA
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